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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 700

PEOPLE OF THE STATE OF ILLINOIS, EX REL., ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS,

vs.

PEORIA LIFE INSURANCE COMPANY, A CORPORATION.

IN THE MATTER OF THE CLAIMS OF: MARGARET HARWICK, ASSIGNEE OF HUGH E. VAN DE WALKER; FIDELITY & DEPOSIT COMPANY OF MARYLAND, ASSIGNEE OF GEORGE C. BERRA; T. A. CURNOW; THOMAS E. ROGERS; EDWIN B. SEIDEL; C. H. DELONG; AND W. H. LOGAN,

Petitioners,

vs.

CHARLES V. O'HERN, AS RECEIVER, AND TIMOTHY W. SWAIN, AS SUCCESSOR RECEIVER, OF PEORIA LIFE INSURANCE COMPANY, A CORPORATION; AND ALLIANCE LIFE INSURANCE COMPANY, A CORPORATION,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Respondents.

ERRORS IN RESPONDENTS' STATEMENT OF FACTS.

On page 4 of respondents' brief in detailing the claims filed by petitioners all reference is omitted to petitioners' claim against the receiver for the present cash value of their interest in renewal commissions based upon a refusal

of the receiver to pay, amounting to an anticipatory breach of the agents' contracts. This same omission is apparent throughout respondents' brief. As pointed out in petitioners' petition for writ of certiorari, pages 23ff, this claim based upon an anticipatory breach has been wholly disregarded by every court which has passed on this case. It is, therefore, especially interesting to note that respondents virtually admit the validity of this claim on page 14 of their brief, where it is said:

> "To like effect, the agents and all other persons interested in its assets became creditors to an amount equal to the value, as of the liquidation date, of whatever contracts they had when the contract ceased."

In considering this point, it is to be borne in mind that the agents had fully performed their part of the agreement and petitioners claims are for compensation for services wholly rendered prior to November 15, 1933.

Also, on page 4 of respondents' brief, in the Summary of Facts, it is stated that after petitioners endeavored to take a direct appeal from the Circuit Court to the Supreme Court of Illinois: "The Supreme Court of Illinois ordered the case transferred to the Appellate Court *on the ground that no constitutional question was involved.*" This statement does not agree with the order of the Supreme Court of Illinois, reference to which appears as an appendix to respondents' brief, although said order is not included in the record. The order in question merely recites that the case was wrongfully appealed, without giving any reason.

Again, on page 8, of respondents' brief it is said that in their attempt to take a direct appeal petitioners allege the same constitutional question now urged in this court. Petitioners claimed that the decree of August 22, 1934, properly interpreted did not take away their rights, but if the decree of August 22, 1934, was held to have taken away their rights, then a constitutional question was involved.

The Supreme Court of Illinois, when first presented with the question, took petitioners' view and remanded to the Appellate Court, but the Appellate Court and the Supreme Court later did hold that the decree of August 22, 1934, took away petitioners' rights, and, therefore, there is a constitutional question. However, the record on the first presentation of this case to the Supreme Court of Illinois is not part of the record in this case. The appendix to respondents' brief quoting the order of the Supreme Court of Illinois, entered October 17, 1938, is immaterial, does not support respondents' statement, and is entirely outside the record in the case now before this court.

Also, we remind the court that the Chief Justice of the Supreme Court of Illinois in his dissenting opinion gives it as his belief that petitioners have been deprived of their constitutional rights. (See petitioners' Petition for Writ of Certiorari, p. 9.)

In their Statement of Facts respondents persist in viewing the Peoria Life proceedings as a pure liquidation. The statute under which this proceeding was held (Illinois Insurance Liquidation Act of June 26, 1925, as amended by Act of May 20, 1929, Illinois Revised Statutes 1933, c. 73, sec. 495 ff) specifically provides that it is within the scope of the proceedings prescribed by said statute for a receiver to take possession of the property of an insurance company and conduct its business, and for the Court to grant such other relief as the nature of the case and the interests of policyholders, creditors, members, stockholders or the public may require. It is apparent that it is within the scope of the Illinois statute for a company whose capital is impaired to be reorganized, reinsured or otherwise rehabilitated. It has been so held (*People, ex rel. Lowe* v. *Old Colony Life Insurance Company,* 270 Ill. App. 403).

Petitioners' Petition for Leave to Appeal, pp. 19-22, shows clearly that whatever may have been the phraseology

of the original order entered November 15, 1933, the Peoria Life was never liquidated but was rehabilitated through a Reinsurance Agreement. Within eight days after the entry of the original order, that is, on November 23, 1933, a modifying order was entered reciting the intention of the receiver to solicit reinsurance proposals and not to proceed with the liquidation. This was what was actually done. In addition the trial judge in his written opinion denying petitioners' claims as against the Alliance Life stated in part:

> "In the summer of 1934, instead of liquidating the Company by sale of all assets and distribution to creditors, a decree was entered looking toward the receiving of bids for the taking over of the insurance business of those policyholders who would continue on therewith."

At various points in respondents' brief, mention is made of the "new insurance" or "new protection" provided by the Alliance Life subsequent to entering into the Reinsurance Agreement. (See Respondents' Brief, pp. 8, 15 and 16.)

As shown in our petition for certiorari, there was no new insurance, the Alliance merely issuing a certificate of assumption, under which it assumed the obligation of the Peoria Life under the same policies, which were continued to be held by the policyholders. The protection was not as great as that formerly provided by the Peoria Life since the only reserve behind the policies was the assets of the Peoria Life Fund, the Alliance contributing no new money and taking no financial risk. Furthermore, the policies were burdened with a fifty per cent lien. Also, the policyholders who continued with the Alliance were required to take no affirmative action to assent thereto and continued to pay the same premiums, which included a loading charge originally added in, to cover petitioners' renewal commis-

sions. These commissions are now being paid to agents of the Alliance who did nothing to earn them.

Respondents urge that petitioners have had their day in court. On page 6 of respondents' brief it is recited that the court in its decree of August 22, 1934, found that due notice of the hearing, at which said decree was entered, had been given to "* * * parties in interest *of record*". This is a recognition by the court that interested parties were entitled to notice, but the notice was limited to those who for some reason had previously participated in the receivership proceedings. Petitioners who had a very substantial interest therein had had no occasion to be made parties of record and received no notice, as the trial judge found.

Petitioners make no objection to the fact that the Peoria Life business was reinsured and taken over by the Alliance, but they do object to the fact that in this process their rights and interests in the Peoria Life business instead of being protected were destroyed.

At page 10 of their brief, respondents state: "The petitioners have had their day in court with proper notice and opportunity to be heard upon their claims." The argument is made that while petitioners had no notice their claims were subsequently considered upon the merits. The same contention is made in different language on page 12 of respondents' brief.

But the point is that the Illinois courts all took the view that petitioners' rights were foreclosed by virtue of the decree of August 22, 1934, pursuant to which the Reinsurance Agreement was entered into, and petitioners, therefore, have had no hearing upon the merits and have been deprived of their constitutional rights, since they received no notice of and were not present at the hearing on August 22, 1934, at which their rights were destroyed. The trial court specifically found that petitioners had no notice of

said hearing. The receiver's only objection to petitioners' original claims was that petitioners' rights were destroyed by the decree of November 15, 1933. In its answer to petitioners' amended claims the Alliance Life made the objection that petitioners' rights were destroyed as of November 15, 1933, by the decree of August 22, 1934, and that in any event the Alliance had no liability by reason of the terms of the Reinsurance Agreement approved by said decree of August 22, 1934. These decrees are the substance of respondents' case although no consideration is given to the fact that petitioners had fully performed their part of their contracts prior to the date the decree of November 15, 1933, was entered and are not even treated on an equality with other creditors, or to the fact that they had no notice of the hearing on August 22, 1934.

It is stated at pages 10-11 of respondents' brief, that petitioners are asking the Supreme Court of the United States to review the decision of Illinois courts in interpreting and applying an Illinois statute, the constitutionality of which is not questioned. Petitioners do not question the constitutionality of the Insurance Liquidation Act under which the Peoria Life proceedings were had, but, as heretofore pointed out, and as has been held by the Illinois courts, that act is not strictly a liquidation act but is so broad in its scope as to permit the reorganization, reinsurance or other rehabilitation of an insurance company whose capital has been found to be impaired. This case, therefore, is not limited to the interpretation of said statute but goes to the much broader question of whether petitioners have in the reinsurance proceedings affecting the Peoria Life been deprived of their rights contrary to Article XIV of the Amendments to the Constitution of the United States.

On page 11 of respondents' brief it is stated that petitioners, by reason of their claim against the receiver based

on an anticipatory breach of their contracts, admit that said contracts were legally terminated on November 15, 1933. Petitioners make no such admission except in the sense that by said decree their contracts were legally terminated as to the right of the two agents who were still active to continue soliciting insurance business. As to the right of the five agents who had retired under agreements that they would continue to receive their renewals, and as to the right of the two active agents to continue to receive their renewals, petitioners deny that said decree terminated either their right to such renewals or their right to receive payment of the cash value thereof as of the date of said decree.

Lastly, it is suggested on page 12 of respondents' brief that petitioners must take the decrees of the Circuit Court as they found them, since by reason of filing claims they are in the position of interveners.

The principle of law that an intervener must take a case as he finds it does not apply. The law has long been settled in Illinois that there can be no intervention without first filing a petition for leave to intervene and securing permission of the court (*Schumacher* v. *Klitzing*, 353 Ill. 530, 533). No such step was taken here, and its omission was not objected to by petitioners.

Further, no attempt was made to comply with Section 25 of the Civil Practice Act (Ill. Revised Statutes, Ch. 110, Sec. 149), as would have been required if plaintiff were, in fact, interveners. The court would not have permitted intervention after the plaintiffs were informed of the construction given the decree of August 22, 1934, and plaintiffs could not have intervened before the decree was entered because they had no notice.

ARGUMENT.

I.

Petitioners' Petition Raises a Substantial Federal Question.

Respondents' arguments on this point rest, as petitioners believe, upon erroneous statements of fact, which are commented upon in the preceding section of this reply brief. Petitioners, therefore, shall not answer this point at length, but respectfully refer the court to their petition for a writ of certiorari and to brief in support thereof, with particular reference to pp. 15-19 of said brief.

However, with reference to the case of *Kammerer* v. *Kroeger*, 299 U. S. 302; 81 L. ed. 253, petitioners desire to point out that no facts are stated in the *per curiam* opinion of the court in that case, which parallel the facts shown here. The constitution and statutes of the State of Ohio are not set forth in that opinion. Neither was there any lack of notice in that case; whereas, in the instant case the constitutional question involved is based upon lack of notice and opportunity to be heard.

II.

Petitioners' Claims Are Meritorious.

It must be stated at the outset that petitioners' claims have not yet been considered on the merits, since the sole question which has thus far been presented to any court is the validity of the decrees of the Circuit Court herein, which were based upon (1) the receiver's defense that petitioners were concluded by the decree of receivership entered November 15, 1933 (although petitioners are not named therein), and (2) the contention of the Alliance Life

that petitioners' rights have been destroyed by the decree of August 22, 1934, which provided that petitioners' contracts were disaffirmed as of November 15, 1933. In other words, the opinions of all the courts which have passed upon petitioners' claims merely advert to decrees of the Circuit Court of Peoria County, Illinois; the original decree of liquidation, in which petitioners were not named, and the decree of August 22, 1934, approving the reinsurance agreement, of which petitioners had no notice and at the consideration of which they were not present and had no opportunity to be heard.

Petitioners, therefore, maintain that they have been deprived of their rights without due process of law, contrary to Article XIV of the Amendments to the Constitution of the United States.

The statement is made on page 13 of the respondents' brief that the rights asserted by petitioners are dependent upon their agency contracts with the Peoria Life, and that the petitioners must be presumed to have entered into those contracts in contemplation of the possibility of the insolvency and liquidation of the Peoria Life. The fact that five out of the seven agents here involved had terminated their contracts voluntarily prior to the receivership and were being paid their commissions for services fully performed as of the date of receivership is overlooked. Also, the arguments in respondents' brief on this point appear to be based upon the misapprehension that the agents' contracts were wholly executory since the proposition is cited that the destruction of a particular person or thing terminates the agreement. This may be a valid proposition of law as applied to contracts executory on each side, but it has no application to contracts such as those in the instant case, which have been fully performed on petitioners' side.

The case of *Martin Emerich Outfitting Co.* v. *Siegel Cooper & Co.*, 237 Ill. 610, has already been distinguished in petitioners' petition for writ of certiorari, pp. 33-4.

It is admitted on page 14 of respondents' brief that the agents, like policyholders, upon the entry of the decree for a receiver became creditors in an amount equal to the value as of the liquidation date of whatever contracts they had when the contracts ceased. Petitioners have no quarrel with this proposition but insist that they have not been granted those rights. Petitioners are in the position of a creditor, for example, who might have sold something to the Peoria Life and fully performed his half of the agreement and was awaiting payment when the receivership decree was entered. Such a creditor would be entitled to payment of the full amount or to payment of the present value of his claim, if the contract was one calling for payment at intervals of time subsequent to the date the bill for receiver was filed. But, while such creditors of the Peoria Life have had their claims allowed, petitioners have been granted no allowance of their claims for renewal commission extending for a period of years beyond the date of receivership, although the present value of those commissions may be easily computed as a matter of common actuarial practice.

The assertion in the respondents' brief that the liquidation proceeding once begun could not be abandoned or changed to rehabilitation is a statement contrary to the fact of what could be done under our statutes and what was done in the instant case; and, even, if it should be the view of this court that an actual liquidation took place, nevertheless, as hereinbefore stated, petitioners have not been granted their equal rights as creditors.

The statement is made, also, in respondents' brief under this point that the reinsurance agreement did not in any way affect petitioners' rights. Nevertheless, paragraph 37 of that agreement purported to deprive petitioners of all rights which they had to renewal commissions; and it sanctioned an arrangement whereby the Alliance Life received the entire business of the Peoria Life as good pay-

ing insurance business while sloughing off all the burdens incident thereto, such as payment of renewal commissions to these petitioners, even though such commissions are included in the premium payments made by the Peoria Life policyholders, and have since as a matter of record been diverted to persons other than petitioners, all to the unjust enrichment of the Alliance Life and its agents.

The statement is made on page 15 of respondents' brief that there was no liquidation in the case of *General American Life Ins. Co.* v. *Roach*, 179 Okla. 301, 65 Pac. (2d) 458, which is relied upon by petitioners.

Reference to the opinion in the Roach case, as reported in the unofficial reports, 65 Pac. (2d) 458, 459, shows the following statement by the court:

> "In 1933 Missouri State Life Insurance Company was overcome by financial difficulties, and was taken over by the Insurance Commissioner of the State of Missouri in compliance with the laws of that State."

The laws of Missouri provided that the State Insurance Commissioner, instead of a receiver, should act in all cases where an insurance company was insolvent or its capital was impaired. No distinction can be drawn on this ground between the *Roach* case and the case at bar, and, just as in the *Roach* case, following the taking over of the insurance company and the finding of impairment of capital, there was here a reinsurance agreement whereby the business of the insurance company was continued without interruption. And in the Roach case, as heretofore pointed out in our petition for writ of certiorari, the claims of the agents of the old company were honored in full.

Statement is made on page 15 of respondents' brief regarding the method whereby the reinsurance agreement called for an assignment to the Alliance Life by Peoria Life policyholders of their interest in the Peoria Life. It need only be said that this particular arrangement is not provided for by statute and was entered into by the parties

concerned purely as a matter of choice and, as petitioners believe, with a view, in part at least, to defeating petitioners' claims and presenting the appearance of a genuine liquidation proceeding.

The statement is also made in respondents' brief on page 17 that the proceedings affecting the Peoria Life have been prosecuted under the statute of Illinois directing the liquidation of delinquent insurance companies, but, as heretofore pointed out, that statute contains broad provisions giving the receiver considerable leeway in handling the affairs of a delinquent company, and, also, it has been held by the courts of Illinois that said statute permits a rehabilitation or a reorganization under a reinsurance agreement. (*People ex rel., Lowe* v. *Old Colony Life Insurance Company,* 270 Ill. App. 403.)

Respondents also argue, under the second point of their brief, that nothing hinges upon the fact that there was no sale of all the Peoria Life assets. Petitioners take exception to this view, since while there was no such sale and distribution of the proceeds to creditors, respondents are endeavoring to treat the whole proceeding as though these things had taken place; that is, the Alliance Life has appropriated to itself the larger portion of the Peoria Life Insurance business, including thousands of policies written by petitioners, is continuing them in force with considerable restrictions without making any financial commitments itself, and yet is denying payment to petitioners for their interest in said policies. Whatever the process may have been or the form adopted, it is perfectly clear that the result is grossly inequitable to petitioners and that this is a case where equity should look through the form to the substance and prevent the unlawful enrichment of the Alliance Life at petitioners' expense.

Conclusion.

Petitioners, therefore, respectfully request that their petition for writ of certiorari to the Supreme Court of Illinois should be granted on the ground that they have been deprived of their rights without due process of law, contrary to Article XIV of the Amendment to the Constitution of the United States.

Respectfully submitted,

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